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No.

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

PULLMAN-STANDARD, a Division of PULLMAN, INCORPORATED,
Petitioner,

v.

LOUIS SWINT and WILLIE JOHNSON,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on this case on August 18, 1980.

QUESTIONS PRESENTED FOR REVIEW

1. Did the Court below apply wrong legal criteria in determining the bona fides of the seniority system?

2. Did the Court below err in failing to apply a "but for" test in determining the bona fides of the Steelworkers' seniority system?

3. Did the Court below err in refusing to allow refusals by black employees of promotions to supervisory positions, to be taken into account in evaluating the statistical evidence?

4. Did the Court below err in holding its "business necessity" criterion essential to defending against a claim of discrimination based on promotion statistics, to the exclusion of non-discriminatory causes, thereby improperly imposing involuntary promotion quotas?

PARTIES[1]

Information under Rule 28.1: Pullman, Inc. became a wholly owned subsidiary on November 6, 1980, of its present parent, Wheelabrator-Frye, Inc.; its subsidiaries (other than wholly owned) are as follows: Baksh-Pullman Kellogg Ltd.; KUB Co. Ltd.; High Concrete Engineering; Kellogg Continental B.V.; Kellogg Continental Construction B.V.; Pullman Swindell Mexicana S.A. de C.V.; and Trailor, S.A.; its only affiliates are the other subsidiaries of Wheelabrator-Frye, Inc., namely: Abrasive Finishing Co.; Bell Aluminum Corporation; Bell Financial Corporation; Belcom Resources Company; Benfur Engineering Company; Frye Copy-Systems, Inc.; Garden City Fan & Blower Co.; Moore International, Inc.; MPB Corp.; National Industrial Constructors, Inc.; Neptune International Corporation; Pershing Park, Inc.; Planning & Service Corporation; The Rust Engineering Company; Sigma Corporation; Sinclair & Valentine Co., Inc.,; Sinclair Valentine & Frye, Inc.; Twin Resco Corporation; Wheelabrator Cleanfuel Corporation; Sheelabrator Corporation of Canada, Limited; Wheelabrator Energy Systems, Inc.; Wheelabrator Financial Corporation; Wheelabrator Fuels Service Corporation; Wheelabrator International, Inc.; Wheelabrator Realty Corporation; Whiting Corporation.

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[1] The parties in the court below were: Louis Swint and Willie Johnson, as representatives of the class of all black persons who were employed by Pullman as production or maintenance employees represented by United Steelworkers of America (USW) within one year prior to the filing of any charges under Title VII; Pullman-Standard, a Division of Pullman, Inc.; USW; USW Local 1466; International Association of Machinists and Aerospace Workers (IAM), Local Lodge No. 372.

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OPINIONS BELOW

The opinions below are reported as follows: (1) Opinion of the United States District Court for the Northern District of Alabama on September 13, 1974, reported at 11 FEP Cases 943 and 8 EPD ¶9720 (A. 1); (2) Opinion of the United States Court of Appeals for the Fifth Circuit on August 30, 1976, reported at 539 F.2d 77, 13 FEP Cases 604, and 12 EPD ¶11,177 (A. 45); (3) Opinion of said District Court on July 5, 1977, reported at 15 FEP Cases 144 and 14 EPD ¶7815 (A. 100); (4) Opinion of said District Court on October 11, 1977, reported at 15 FEP Cases 1638 and 15 EPD ¶7993 (A. 124); (5) Opinion of said District Court on May 5, 1978, reported at 17 FEP Cases 830 and 17 EPD ¶8604 (A. 128); (6) Opinion of said Court of Appeals on August 18, 1980, reported at 624 F.2d 525 and 23 FEP Cases 748 (A. 153). Copies of these opinions are appended to this petition at the indicated page numbers.

JURISDICTION

The judgment sought to be reviewed was dated and entered on August 18, 1980. By order of November 7, 1980 this Court granted petitioner an extension of time within which to petition for certiorari, to and including January 15, 1981. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

Title VII of the Civil Rights Act of 1964 (hereinafter "Title VII"), 42 U.S.C. §§2000e *et seq.*, specifically Section 703 thereof (42 U.S.C. §2000e-2) and Section 706 thereof (42 U.S.C. §2000e-5). Additionally the Civil Rights Act of 1866, 42 U.S.C. §1981. Sections 703, 706 of Title VII and Section 1981 are set forth in their entirety at A. 180-191.

STATEMENT OF THE CASE

Jurisdiction in the District Court was based on §706(f)(1) of Title VII and 42 U.S.C. §1981. The original parties defendant were petitioner, Pullman; USW; and USW Local 1466. By pretrial order the issues were limited, and further narrowed in the first appeal to the Fifth Circuit (A. 45), to the following:

> (a) That a system of departmental seniority,[2] even with changes made pursuant to a corrective action program with the Department of Labor, nevertheless perpetuates the effects of past discrimination in the assignment of black employees to generally less desirable departments.
>
> * * *
>
> (c) The Company has discriminatorily failed to promote black production and maintenance employees to supervisory and managerial positions.

The complaint was amended on the first day of trial to add Local Lodge 372, IAM, as a defendant, but only for the limited purpose of enabling the Court to order appropriate changes in its union contract with Pullman.

In the first 16-day trial the evidence showed:

The Pullman plant at Bessemer, Alabama, is the world's largest freight car building plant. It manufactures many types of railroad cars. Not only are there frequent and large fluctuations in the size of the work force at Bessemer, but also as each new car order goes into production, there are large manpower fluctuations in Pullman's 27 departments which peak at quite dif-

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[2]The "system of departmental seniority" referred to is the system established by Pullman's contract with the United Steelworkers. The undisputed evidence shows that the contracts between Pullman and IAM Local Lodge 372 have always since 1944 provided for accrual and application of seniority by job classifications.

ferent times. From the late 40's until June, 1965 a number of the better jobs were de facto occupied only by whites, although earlier than that, back to the time the plant was built in 1929, a good many of these were racially mixed. In March, 1965, the USW obtained a labor arbitration award ordering the Company to give performance tests in riveting to blacks, the riveters classification being at that time all-white. Immediately the Company took steps throughout the plant to open up any de facto barriers to negro advancement to the highest paid departmental jobs. The result in all 18 racially well mixed departments was to eliminate in fairly short order, the effects of alleged past discrimination, for as soon as a black Helper became qualified, if he was senior to a white Operator, the next time there was a layoff and recall, the black got first preference for an operator vacancy.

Over a period of several years beginning in 1968 Pullman negotiated with the Office of Federal Contract Compliance (OFCC) terms of a Corrective Action Program and implemented them as tentative agreements were reached. All departments were substantially integrated in June, 1965, except five were all white, three were all black and the Steel Miscellaneous Department had two whites and 86 blacks. The OFCC agreement provided that the black incumbents of these substantially all-black departments would be entitled to special transfer rights to any department in either bargaining unit with carryover of plant seniority and retreat rights; further that *all* Negroes employed prior to April 30, 1965 (a date selected as the date after which no affirmatively discriminatory practices or system persisted) were granted the same preferential transfer rights to the all-white departments. The OFCC agreement, which is of unlimited duration, contained many other affirmative action provisions favoring blacks, all administered by two salaried Contract Compliance Officers, one black and one white.

Pullman presented a variety of statistical studies which indicate, along with other proof, that its seniority system and the OFCC Agreement have in fact not perpetuated any wrongs or retarded black progress but that blacks have rapidly advanced in accordance with the rightful place principle. The actual percentage of black employees at Bessemer is significantly higher than in the relevant labor market; random distribution therefrom would result in a work force about one-third black, while the observed frequency is around 50%. In the last year before the first trial for which such data was available, 1973, the mean annual earnings of black employees, including Unemployment and Supplemental Unemployment Benefits was *98.5%* the average for all employees. Calculation of mean annual earnings for 1970 through 1973; showed the black percent of the mean was 94, 96, 96.1 and 98% respectively. It is clear that there has been a gradual and consistent improvement in the prosperity of black employees.[3] The District Judge's independent analysis of the data showed that 40% of the blacks and only 36% of the whites were in the upper half of departments ranked according to departmental disirability.[4]

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[3]The Fifth Circuit in the 1976 appeal held (A. 71) that these statistics were *irrelevant* and that it was improper to consider them, because they did not reflect differences in seniority and time worked.

[4]The Fifth Circuit's 1976 opinion held that "departmental desirability" was not relevant to whether there had been racially discriminatory departmental seniority system (A. 59, 64) except that it would be relevant to prove, but not to disprove discrimination. The opinion further said evidence of economic harm was irrelevant to the question of discrimination unless it favored plaintiffs' case, and also irrelevant to an award of back pay unless defendants first carried a burden of "convincingly [bringing] into question the class' entitlement to it." The Fifth Circuit's 1980 opinion again said (A. 165-66) that although evidence of economic desirability cannot help the defendant, it may be considered to the extent it favors the plaintiffs.

The evidence at the first trial showed with regard to supervisor promotions:

As found by the trial court, between mid-1965 and the time of the trial, 56 blacks, approximately one-third of the total number, were appointed as hourly foremen, and considering the higher incidence of functional illiteracy among black employees, and of refusals by blacks of such promotions, this does not support a claim of discrimination since 1965. Promotions to salaried foremen, approximately 20% of those since mid-1965, were also found not disproportionate considering such factors. The District Court further found:

> "There are many reasons why an employee, white or black, might choose to reject a temporary promotion to foreman; but it is clear from the evidence that an additional problem for blacks considering acceptance of such positions . . . was the likelihood of derision as an 'Uncle Tom' by some black co-workers."[3] (A. 25)

The District Court's finding has never been questioned that:

> "The evidence has not shown a single example of a black indicating an interest in a foreman's job being passed over in favor of a white with less qualifications." (A. 25)

The District Court's first opinion,—

> "found Pullman's departmental seniority system not to be in violation of Title VII, basing its decision in large part

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[3]There was a great deal of evidence, all uncontradicted, of massive peer pressure by a small segment of blacks on other blacks to discourage them from accepting foremen positions, to discourage them from doing a responsible job of maintaining order and discipline, once made an hourly foreman, and to intimidate them into giving it up after accepting the job. A vocal minority of the black employees engaged in concerted name-calling, abusive language, uncooperativeness, even a radio broadcast to harass and intimidate black supervisors.

> upon a finding that the evidence was insufficient to show past discrimination respecting departmental assignment to most of the departments. . . . While finding that there had been discrimination in assignments to nine [of 27] departments, the trial court concluded that, in view of the transfer opportunities given blacks in 1972, the effects thereof were not being perpetuated." (A. 103)

The Court of Appeals has never addressed itself to the finding that there never was discrimination in assignments to two-thirds of the departments, which included all the large ones.

On the first appeal, the Fifth Circuit did not reverse anything, but with respect only to the seniority and foreman issues "vacated and remanded." It found it was "error to require plaintiffs to prove economic harm as an element of their prima facie case of racially discriminatory departmental assignment" (*sic; scil.* departmental seniority system). But it did not find the error was prejudicial, for it said with respect to this issue:

> "It would be inappropriate for this court to decide here whether a prima facie showing was made. . . . This evidence-weighing process should be conducted by the district court in the first instance, *especially since the question is so obviously a close one.*"[6] (A. 65)

No explanation was given of how the question of *disparate impact* can be prescinded from an economic comparison. With respect to foreman promotions, the Fifth Circuit on the first appeal held that greater frequency of functional illiteracy among black employees and their lower skill levels in some jobs cannot

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[6] On much the same evidence, the Fifth Circuit panel on the second appeal said it had "a definite and firm conviction that a mistake has been made," made many findings contrary to those of the District Court and rendered final judgment on all issues, remanding only for a remedial order. (A. 170, 171).

lawfully be considered in evaluating the observed data on supervisory promotions; illiteracy was held to be an impermissible factor unless Pullman adopts a *minimum education requirement,*[7] and either validates this or proves it is a business necessity "under the strict guidelines of Title VII" [*sic*]; also that relative lack of skill is an impermissible factor unless "the needed skills are justified by a business necessity".

After remand, the evidence at the second trial showed: (1) Of the total of 447 white welders hired between June 1, 1963 and May 31, 1965, at least 435, or 97.3% had prior formal training or experience as a welder. (2) Of the 49 Electricians in Pullman's employ on June 1, 1965, or during the preceding year, at least 46 had prior electrical experience or formal training. (3) Of the 37 Pipefitters employed by Pullman on June 1, 1965, or during the preceding year, at least 32 had prior formal training or experience. (4) On June 1, 1965, blacks held 57% of the jobs in the Maintenance-CIO department other than electrician or pipefitter. (5) Of the 1,151 black employees on the seniority roster on June 1, 1965, 1,148 had no prior training or experience as welder, electrician or pipefitter. One had prior pipefitting experience; two had prior welding experience. Between trials, 394 promotions of blacks to temporary foreman had been made, or 31.1 of the total of 1,265. One third of the 12 new salaried foreman were black.

Following the second trial, and before a decision was announced by the District Court, this Court decided *Teamsters,* 431 U.S. 324 (May 13, 1977) and *United Air Lines,* 431 U.S. 553 (May 31, 1977). The District Court's second opinion, pointing out that *Teamsters* had discredited the "perpetuation of past discrimination" test of seniority system validity; explicitly found that the seniority system was adopted and maintained free of racial purposes; that it is neutral in form, consistent with industry practice, and particularly for a company with

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[7] No reason was given for this strange proposition. (A. 81).

Pullman's operational characteristics, quite rational; and that it has been uniformly applied. The Court qualified this with a finding that under the OFCC Corrective Action Program, Pullman agreed to changes in the seniority system "which are purposefully discriminatory — in favor of affected blacks — and, which are not neutral at all" and that the system as modified does not discriminate against blacks and is valid under §703(h). The court found:

> "that the somewhat disparate compositions of the departments in the post-1966 period were attributable to the assignments made prior to Title VII. ...
>
> "... These statistics give rise to no inference that assignments were being made to further a policy of segregated or racially imbalanced departments. Indeed, if anything the reverse is true: the post-1966 assignments indicate that the company was engaged in efforts to move whites into formerly all-black or predominantly-black departments and blacks into formerly all-white or predominantly-white ones.'" (A. 106)

The district court said that one method of statistical proof approved in *Teamsters* is to compare racial composition of departments with census information (A. 105)[8]; that although

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[8] The Fifth Circuit gave no consideration to this finding or to the statistics supporting it; but made specific reference only to assignments to the two IAM Departments (A. 162-63) as somehow tainting the whole USW seniority system of which they are not even a part, and even though training or experience is particularly a legitimate consideration in hiring machinists and millwrights.

[9] The Fifth Circuit made no comparison of its data on assignments to the two IAM Departments to census information. While those data include 1965, a period clearly prior to any conceivable period of limitations, even assuming their correctness and relevance, had such comparison been made, it would not support an inference of discrimination. See pp. 17-18 below.

> "In Teamsters, the statistical data gave rise to an inference of discrimination, a conclusion 'bolstered' by evidence of specific employment practices; here, the statistics for the period in issue give rise to the contrary inference, a conclusion abundantly supported by the other evidence in the case." (A. 106)

Not only was there no statistical basis for upsetting this finding; there was not a single instance shown of a black applicant who was qualified for any job during the period of limitations who was not hired for it.

The district court found that there were no assignments to departments which discriminated against blacks in the limitations period. There was no evidence to the contrary. Even the two departments the Fifth Circuit isolated as worst case statistics would not sustain any inference to the contrary, and when all 27 departments instead of only two are taken into account, the statistical case is further shown to be non-existent.

As for supervisory promotions, the district court compared the racial distribution of salaried supervisors to the "group . . . which, when special qualifications are needed to fill particular jobs, possesses those qualifications." Finding that it was clear from the evidence if not from common sense that special skills are needed by supervisors, the District Court reasoned that it was *appropriate to a statistical analysis* to consider temporary foreman promotions department-by-department. The evidence and the District Court's own findings showed that Pullman did not restrict promotions to temporary foreman to intradepartmental ones.[10] (A. 113)

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[10] The Fifth Circuit, however, seized on the trial court's use of Title VII jargon in justification of a statistical method, to condemn Pullman as if it had imposed a "facially neutral test with disparate impact" on promotions to temporary foreman, which it never imposed and which undisputed evidence shows was never a requisite to such promotions.

The District Court found on ample evidence:

> "When both the statistical data, fairly evaluated, and the non-statistical evidence are fairly considered, the court is convinced, and so finds, that the plaintiffs' *prima facie* showing of discrimination in promotion of temporary foremen in the Welding Department has been rebutted and that no such discriminatory practice existed subsequent to 1966. The same finding is made with respect to promotion of temporary foremen in the other departments." (A. 117)

The District Court's statistical demonstration, by the use of standard deviation analysis, that Pullman did not discriminate in promotions to foreman, is quite unremarkable.

The District Court therefore concluded after its second trial that no law had been violated (A. 117). Thereafter, the District Court granted plaintiffs' motion to reopen the record upon the issue of the validity of the seniority system under Section 703(h)" (A. 126) after which the following evidence was introduced:

On August 1, 1941, the Steel Workers Organizing Committee (SWOC) filed with the NLRB a petition seeking to represent a unit of all Pullman's production and maintenance employees. Thereafter the IAM intervened seeking to represent a unit composed of:

> "all machinists, apprentices and helpers in the maintenance and other departments where they work,

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The Fifth Circuit then said there was no "evidence sufficient to show that the *limitation* upon which *the defendant's business necessity defense rests* is essential to the safety and efficiency . . .", so Pullman is guilty. In short, the evidence showed no promotion criterion existed; it was only a criterion for analyzing statistics. But the result of this semantic maze of Newspeak was that sight was lost completely of that fact.

> namely, the wheel and axle shop, the machine shop, the tool and die shop, and the welders, and the air brake department."

At the NLRB hearing the IAM representative stated that he sought a unit consisting of everyone that he could represent under the union constitution, specifically including Negroes. The IBEW also intervened seeking to represent an electrical craft unit. Pullman stated it took no position with respect to the appropriateness of the units requested. The NLRB found that all the employees sought to be represented by the IBEW or IAM "appear to come under their craft jurisdictions"; and that any of the units sought could be an "appropriate unit".[11]

Following the NLRB election on October 7, 1941, IAM, IBEW, and SWOC were certified for the three units, the two craft units and the residual production and maintenance unit[12] respectively.

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[11] The Fifth Circuit said:

> "The district court might have reached a different conclusion had it given the I.A.M.'s role in the creation and establishment of the seniority system its due consideration. No credible explanation has been advanced to sufficiently justify the separate seniority units." (A. 170)

It is submitted that the Fifth Circuit cannot on the basis of *credibility*, reject the defendants' explanation that their bargaining was conducted according to NLRB certifications.

[12] The Fifth Circuit incorrectly asserts as a fact "the creation of the various all-white and all-black departments *within the USW unit* at the time of certification. ..." (A. 171) for the evidence is positive and uncontradicted, that these departments within the USW unit certainly existed prior to any certification. Likewise there was no basis for the Fifth Circuit's finding that the USW "succeed[ed] in significantly segregating the departments within its own unit".

The first contract between Pullman and the SWOC was negotiated with a union committee consisting of two blacks and two whites. At all times since, USW local union officers have been about half white and half black. The first USW contract contained a departmental seniority provision proposed by this biracial committee. Some time late in 1941 the IAM and SWOC became aware of minor errors in the description of the IAM bargaining unit in its certification, certain non-craft classifications being included which the IAM had not petitioned for, and two departments being erroneously named as one. The two unions sought NLRB help in correcting these, which resulted in an agreement between them approved by the Board. Contrary to the statement of the Fifth Circuit (A. 170) the IAM unit was not all white following this 1941 clarification. After that date, for example, some or all of the IAM welder helpers, specifically included in the IAM unit by the 1941 clarification, were black, and this remained true at least until 1944. On May 25, 1944 the USW filed a petition seeking representation of all the IAM employees. This representation question was settled in an informal settlement conference held by the NLRB hearing officer among the USW, IAM and Pullman. The subject of the conference was whether the USW would be willing to settle for part of the IAM unit, and leave the rest for IAM. Herring, a USW spokesman at the meeting, testified that he told the IAM "we are going to take who we want, and not who you want to give us." Pullman had been having numerous strikes and certain members of the IAM had been crossing USW picket lines. Herring said he told the IAM that the USW would take everyone but the machine shop and the millwrights and that the USW did not "want them scabbing son-of-a-Bitches, they come across our picket line." The two unions then agreed to a compromise, which was approved by the NLRB and reduced to writing on June 14, 1944 which left the IAM only those employees who had crossed USW picket lines; that is, the machine shop employees in Die and Tool and the Millwrights in Maintenance, transferr-

ing all to the USW unit.[13] The IAM unit lost approximately 100 employees to the USW and retained about 50. Possibly as many as 20 of the 100 lost were black and it is certain that Mose Johnson and Early Bell at least were black IAM welder helpers transferred to the USW unit at the time. Pullman was entirely passive in the matter. No one lost any seniority or promotional advantage and two split departments were put back together again in the USW unit. When the IAM agreement was amended on October 6, 1944, job classification seniority was adopted with respect to layoffs and recalls.

A basic change in the seniority clause was negotiated in the 1947 USW contract in that it provided for *occupational* seniority as Dickerson, a black committeeman, had proposed. From 1947 to 1954, while the regime of occupational seniority groupings continued, the seniority lists show several changes of departmental names and one or two nominal mergers and schisms which had no effect on anyone's seniority status since it was at that time on an occupational basis. In the first half of 1952, anticipating a demand by USW for Company-wide negotiations, Pullman undertook a "comprehensive study" comparing its union contracts at various plants. At the time Pullman operated three car or car repair plants other than Bessemer.[14] In 1954 company-wide bargaining was instituted

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[13] Viz., all welding, wheel & axle, air brake, and steel erection tool room employees. The district court found with ample support that the USW's "concurrence in the 1944 agreement, which resulted in still further blacks and whites being added to its ranks, was not due to a desire to confer any benefits upon the all-white IAM remnant; rather, it was refusing to accept those remaining whites because it viewed them as scabs. ..." (A. 145)

[14] The Butler, Pennsylvania plant is a car plant, not quite as large as Bessemer; its output is limited almost exclusively to hopper cars. It has always had a departmental seniority system and departments quite similar to those at Bessemer since 1954, without the OFCC agreement

with the USW which resulted in return to a departmental seniority system at Bessemer. The department setup reverted almost exactly to what it was before the change to occupational seniority.[15]

The Fifth Circuit held that a discriminatory purpose of the seniority system ought to be inferred from the changes in USW departments, all before September 1, 1954. But the combining and separation back of Janitors and Plant Protection on the seniority lists both occurred at a time when seniority was by job

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modifications. In 1965 its work force consisted of 2531 white and 16 black employees, or .6% black. According to the 1954 study, there were no basic problems in its departmental seniority system. The Hammond, Indiana plant does not produce cars, but makes box car doors and components of cars and makes car repairs. It has always had departmental seniority. In 1954, there were no problems with the departmental seniority system in management's view. On December 3, 1965, the Hammond work force of 470 was 87% white, 11.7% black, 1.1% Spanish surnamed Americans, and less than .1% American Indian. The Worcester, Massachusetts, plant was a car building plant with a plant wide seniority system. As a result, according to the study, it also had an excessive number of seniority grievances. *Every time* a vacancy was filled on the basis of relative ability, grievances were filed. The Worcester plant has since been permanently closed for economic reasons, substantially contributed to by the plant-wide seniority procedure (A. 136)

[15]The only exceptions were: (1) The Boiler House was established as a new department. There were only three bargaining unit employees in that new department on September 1, 1954 and it has been entirely vacant since June 22, 1964. If there were any discriminatory motive, any arguable adverse effect thereof on blacks ceased prior to Title VII. (2) It was also agreed to merge the Paint and Shipping Track Departments effective September 1, 1954. This resulted in a department consisting of 59 black and 44 white employees, instead of two departments composed respectively of 53 black and 36 white, and 6 black and 8 white employees. (3) The Inspection Department continued to exist.

classifications so that neither was a change in seniority units; the only new seniority unit was the Inspection Department, which was created, dissolved and recreated during the job classification seniority era and had an obvious rational basis; and the merger of Paint and Shipping Track Departments resulting in greater integration and racial balance which makes it clear that factors other than race were determinative.

The seniority system in the IAM unit since 1944 has been based on length of continuous service *within job classifications.* If breadth of seniority groupings were a product of discrimination against Negroes, one would expect broader seniority groupings in the IAM unit than in the USW, yet the contrary is true.

The seniority system at Pullman's Butler plant, where blacks have always constituted a very small portion of the work force, has always been a departmental system similar to that which the Bessemer USW unit had prior to the OFCC agreements in 1972. If racial discrimination really had anything to do with adoption of departmental seniority, it is inexplicable that departmental seniority was always in effect in Butler.

Following this trial, the District Court again found in favor of the defendants. It found the departmental seniority system to be facially neutral in the same way the system in *Teamsters* was; that the seniority units constituted as a whole a rational structure,[16] in accord with the industry practice, and consistent with NLRB policies. As for "genesis" of the seniority system, the District Court found as to Pullman's role:

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[16]The Court found that, given the economic conditions under which this plant must operate, "the failure to require that jobs be fairly closely related to constitute a seniority unit could be expected to produce undue bumping or displacements, highly inefficient performance, or excessive grievances over ability factors, or all of them." (A. 136) The Fifth Circuit evidently ignored these findings and the abundant supporting evidence, and found:

> "The effort of the plaintiff to fix responsibility on the company for whatever racial discrimination may have existed in the IAM is likewise without merit. The Company properly took a 'hands-off' approach toward the establishment of the election units. It bargained with those unions which were afforded representational status by the NLRB, and did so without any discriminatory animus." (A. 146)

The Fifth Circuit did not address itself to the question of how Pullman could be liable for the alleged "motives and intent of the IAM in 1941, and 1942." It said the USW "acquiesced in the discrimination" (A. 170) and added the erroneous finding, "while significantly segregating the departments within its own unit." Nor did it address itself to the fact that the USW negotiated its own departmental seniority system independently of the IAM.

The Fifth Circuit avoided such difficulties by calling the District Court's reasoning "blemished", declaring that IAM's alleged motives in 1941-44 somehow requires both seniority systems to be lumped into one and makes both *mala fide*."

> "The establishment and maintenance of the segregated departments appear to be based on no other considerations than the objective to separate the races. . . . No credible explanation has been advanced to sufficiently justify the separate seniority units." (A. 167, 170)

In effect the Fifth Circuit refused to believe the evidence.

"The *Teamsters* case was finessed by lavish use of hyperbole: "It is crystal clear that considerations of race permeated the negotiation and adoption of the seniority system in 1941 and subsequent negotiations thereafter." (A. 169) This despite the undeniable fact that the certification of the IAM bargaining unit and clarification thereof, to which the evil "genesis" was primarily attributed, preceded any negotiation, any contract, and any seniority system; and despite the fact that blacks and whites were always approximately equally represented in USW contract negotiations.

The District Court also found that departmental seniority was the most probable type of seniority system USW and Pullman would have adopted irrespective of racial considerations:

> "Indeed, as the company has established—by publications of the Department of Labor, various collective bargaining agreements, and contemporanious studies made by it at the time of contract negotiations—seniority by departmental age such as found at Bessemer was the modal form of agreements generally, well as the manufacturers of railroad equipment in particular." (A. 143)

This finding implies and would justify the conclusion that Pullman and USW would have reached agreement on a departmental system in the absence of any racial considerations.

The Fifth Circuit treated as though it was a separate issue, whether there were racially discriminatory assignments to departments within the relevant time period and concluded that there had been.[18] The only specific assignment data considered in its opinion were for the two IAM departments, Die & Tool and Maintenance-IAM; the opinion states as to the former:

> "Our review of the evidence indicates that between 1965 and 1970, the company made approximately thirty-six new assignments to this department, all white persons. The first black was assigned to the department in 1970. In 1971, seven whites were assigned to the department along with two more blacks." (A. 162)

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[18]The Fifth Circuit's opinion does not address itself to the question of the proper period of limitations. The District Court gave plaintiffs the benefit of the doubt and used the earliest possible date, September 28, 1966, although expressing substantial reservations that such a date is proper. Under *Electrical Workers* v. *Robbins & Myers, Inc.*, 429 U.S. 229 (1976), February 10, 1970 appears to be the correct. In its deliberations the Fifth Circuit gave weight to data in 1965 and all of 1966. We will cite in this petition assignment data for 1965-70 although much of it is time-barred.

The Fifth Circuit says these statistics were obtained from "seniority lists for the years 1965 to 1973." The District Court had come up with other figures. In actual fact the record shows as to Die & Tool-IAM, the following newly assigned employe by classification, and race:

Time Period	Machinist	Machinist Apprentice	Tool Rm Man	Crane-Man	Die man	Tool Grinder	Clean-up man
1965	12(W)	2(W)	2(W)	2(W)	2(W)	2(W)	
1966(3 qrs.)	7(W)		1(W)		3(W)		
1966(4th qr.)	5(W)	1(W)					1(B)
1967	7(W)						
1968							
1969	1(W)						
1970		2(B)					

There is no way to count 36 white assignments, either for 1965-1970 inclusively, exclusively, or in any combination of years. If one takes the data beginning with the earliest possible limitations date (September 28, 1966), through the year 1970, there were 14 whites and three blacks newly assigned to Die & Tool-I.A.M. All but one of the whites were machinists. From available 1970 census data[19] the expected number of black machinists if 13 were hired at random from those in Alabama would be 502/6291 times 13, or in round numbers 1. The standard deviation would be calculated as $\sqrt{(.08)(.92)(13)}$ or 1. The difference between expected (1) and observed (0) would be one

[19] The 1970 census shows that in the State of Alabama there were 5,789 white and 502 Negro "Machinists"; and 25,248 white and 2,215 Negro "Mechanics and Repairmen, except Auto", the census category most nearly corresponding to Millwrights, who make up the IAM Maintenance Department.

standard deviation, well within the two or three exceeding which could give rise to an inference of discrimination. This is confirmed by undisputed testimony that Pullman was making strenuous efforts to find black machinists and could not. As for the remaining classifications, hiring at a ratio of 3 blacks to 1 white could not show discrimination against blacks. The Fifth Circuit reached an erroneous conclusion through clearly improper use of statistics.

As for the Maintenance-IAM Department, the Fifth Circuit said

> "the company assigned seven new employees to this department between 1967 and 1970, all of whom were white. The first blacks were assigned to the department in 1970 when six blacks were assigned to the department along with four whites."

The seniority lists for 1967-70 inclusive show all new hires in that period were junior millwrights as follows:

1967 - 1st quarter - None

1967 - 2d quarter - 10(W)

1967 - 3d qr. through 1st qr. 1970 - inclusive — None

1970 - 2d quarter-4(W), 3(B)

1970 - 3d quarter-3(B)

1970 - 4th quarter-None

Thus the Fifth Circuit counted a higher than actual ratio of black hires. The totals for the period are 14 white, six black. If you take the percentage of black "mechanics and repairmen, other than auto" in Alabama according to the 1970 census, or 8%, it could well be concluded that Pullman was engaging in reverse discrimination.

The Fifth Circuit inexplicably erred in counting (as apparently the District Court did also), but the "worst case" examples picked by it, simply do not sustain any statistical inference that Pullman discriminated against blacks in assignments to the IAM departments, much less the 25 USW departments, where reverse discrimination was very much in progress.

REASONS FOR GRANTING THE WRIT

I

The Court Below Applied Wrong Legal Criteria In Determining The Bona Fides Of The Seniority System Under *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324 (1977). —

The *Teamsters* case involved a motor carrier which had 51 terminals and 124 separate Teamsters contracts. At various terminals there were separate over-the-road, city, garage, and clerical bargaining units, each having separate seniority. The road drivers, at all terminals, both before 1965 and until the time of suit, were all white, with one individual exception at the Chicago terminal. All minority drivers were placed into city jobs. This Court held "that the Government had proved a prima facie case of systematic and purposeful employment discrimination, continuing well beyond the effective date of Title VII" and until the time of trial; that this Post-Act discrimination within the statute of limitations could properly be remedied by full make-whole relief, including retroactive seniority, without attacking the seniority system. Also there was proof of "over 40 specific instances of discrimination." Nevertheless the bona fides of the seniority system was sustained; the basic holding was "that an otherwise neutral, legitimate seniority system does not become unlawful under Title VII simply because it may perpetuate pre-Act discrimination."

Except in one particular, discussed in the next paragraph, there was no evidence in this case qualitatively different from

that in *Teamsters*, and it was markedly less quantitatively. Instead of over 40, there was not one instance shown of a particular black employee having been discriminated against at any time; instead of some 50 or 51 all white road driver units, and a comparable number of racially mixed city driver units, Pullman had five white seniority groups, four which were all or substantially all black, and 18, including all the large ones, which were racially mixed. Instead of discrimination in hiring road drivers continuing up until the time suit was brought, the evidence here showed reverse discrimination favoring hiring of blacks in the previously white department and whites in the previously black departments, commencing before any statute of limitations applicable to this suit; the "worst case" statistics cited by the Fifth Circuit for the two IAM Departments, upon application of statistical principles approved by this Court, do not sustain any inference of discrimination even for the isolated area and period of time selected by the Fifth Circuit to sustain the substitution of its factual findings for those of the District Court.[20]

The one fact that differs from *Teamsters* in a direction arguably adverse to defendants herein, is the NLRB certification in 1941 of IAM Local 372, for a craft unit found by the NLRB to be craftsmen and their apprentices and helpers; and subsequent shrinking of that unit (again with NLRB certification) to comprise only millwirghts in the Maintenance Department, and machinists, and a few related craft classifications and helpers in IAM-Die & Tool. The existence of the Board-certified IAM unit since 1944 is somehow held to negative the bona fides of the departmental seniority system agreed to between Pullman and USW quite causally unrelated to the existence of the IAM unit.

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[20] The Fifth Circuit made no effort to compare the observed data with the ethnic composition of qualified machinists and millwrights and other skilled workers in the labor market.

In short, the Fifth Circuit has applied *Teamsters* in such a way as to invalidate a seniority system, substantially on the circumstance that Pullman and USW bargained for a unit certified by the NLRB since 1944. All other evidentiary factors were equally or more favorable to defendants than corresponding factors dealt with in *Teamsters*.

Pullman earnestly submits that whatever the state of mind of members of the IAM was in 1941 and 1944, its compliance and the USW's compliance with facially valid orders of the NLRB for over 25 years cannot properly be the basis of an inference of bad faith in the departmental seniority system arrived at by them acting quite independently of IAM; and that the *Teamsters* case is therefore controlling authority that their seniority system was bona fide. Friedman, *The Good Faith Defense in Constitutional Litigation*, 5 Hofstra L.Rev. 501 (1977).

The writ should be granted because the Fifth Circuit should not create an exception to *Teamsters* based on actions of Pullman and USW in obedience to the order, valid on its face, of a duly constituted agency of the United States, made 35 years ago. They had no real choice of what unit they would bargain for.[21] An important question is presented as to whether the validity of decades-old NLRB certifications is subject to collateral attack in this manner, particularly where IAM Local 372 was made a party to this action solely to the extent of subjecting Local 372's contract — not its certification nor its existence as a labor organization — to possible modification.

The obvious fortuity or lack of causal relation between the certification of separate units, and the reaching of an agreement between Pullman and USW on departmental seniority within its

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[21] (except the choice made by the Steelworkers in 1944 to leave the "scabs" in the IAM unit and to take the rest who included blacks and whites, into its unit, a choice which was clearly not invidiously racial).

unit, suggests that the Fifth Circuit continues to adhere to its earlier position in *Teamsters*, reversed by this Court, and that the instant holding is invalidation of a seniority system under the perpetuation of past discrimination formula in scarcely altered guise; that now it is discrimination "in the air" in the 40's and alleged invidious motives of the IAM in that era, that serve to condemn the agreement of Pullman and the USW.[22] The importance of these questions to the proper application of *Teamsters* justifies granting the writ.

II.

The Court Below Erred In Failing To Apply A "But For" Test In Determining The Bona Fides Of The Seniority System. —

The undisputed evidence showed, and the District Court found, that the modal form of seniority system in heavy American industry was in the 40's and still is departmental. A majority of such systems provide for departmental or smaller size seniority units. This is even more markedly true of the transportation equipment industry of which the Bessemer plant is a part. Furthermore, in addition to the fact that departmental seniority systems are typical of car-building plants of competing companies in widely separated parts of the country, Pullman has departmental seniority systems at both its Hammond car components plant, and at its Butler carbuilding plant.

The District Court's valid findings imply ineluctably that USW and Pullman would not have bargained for a plant-wide (or bargaining unit-wide) system had the racial composition and mores of the Bessemer plant, been different. In short, the record shows that Pullman and USW would have agreed on a

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[22] The disregard for the trial court's findings by the Fifth Circuit and substitution of its own unsupported firm this conclusions contravenes Rule 52(a). Although the Fifth Circuit states at A. 170 that Rule 52(a) does not apply to findings made "under an erroneous view of the law", no erroneous view of the law by the District Court has ever been identified by the Fifth Circuit.

departmental system anyway, just as they did at Butler in Company-wide bargaining. The record therefore presents an important question of first instance under Title VII: Can a seniority system be held not bona fide under §706(h) if it would have been adopted anyway, that is, even absent any racial factor? The Fifth Circuit gave no consideration to this question, but held the motivation of IAM in securing certification of a separate craft unit, which eventually shrank to an all white bargaining unit, plus a diluted version of the sort of evidence in *Teamsters, supra,* required reversal as a matter of law of the District Court's conclusion that the seniority system was bona fide.

In dealing with plural causation of employer action, in *Mt. Healthy Board of Education* v. *Doyle,* 429 U.S. 274 (1977), this Court held that even if a public employee's exercise of First Amendment rights played a "substantial part" in a public employer's decision not to renew his employment, that would not necessarily be wrongful:

> "Initially, in this case, the burden was properly placed upon respondent to show that his conduct was constitutionally protected, and that this conduct was a . . . 'motivating factor' in the Board's decision not to rehire him. Respondent having carried this burden, however, the District Court should have gone on to determine whether the Board had shown by a preponderance of the evidence that it would have reached the same decision as to respondent's reemployment even in the absence of the protected conduct." 429 U.S. at 287.[21]

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[21]This Court held in a Title VII discharge case, *McDonald* v. *Santa Fe Trail Transportation Co.,* 427 U.S. 273, 282, n.10 (1976), that in such case it must be shown that "race was a 'but for' cause." The NLRB also recently adopted the *Mt. Healthy* standard *Wright Line, Inc.,* 251 NLRB No. 150, 105 LRRM 1169 (October 11, 1980).

This record squarely presents, the question whether the but for test of causation must not be applied to determine the bona fides of a seniority system, where there is substantial evidence, as here, that a departmental seniority system would have been adopted for purposes of maximizing efficiency and in accordance with industry practice and generally believed principles of industrial management, even if there had been no racial aspect involved. This is an important question in the administration of Title VII which was overlooked or ignored by the Court below, and which is certain to recur in many contexts.[24] The writ of certiorari should be granted so that this Court may authoritatively decide this question.

III.

Did The Court Below Err In Refusing To Allow Refusals By Black Employees Of Promotions To Supervisory Positions, To Be Taken Into Account In Evaluating The Statistical Evidence, On The Assumption That Black Peer Pressure On Black Supervisors Causing Such Refusals, And Causing Poor Supervisory Performance, Was Obviously The Natural Result Of The Employer's Failure To Attain Straight Quota Promotion? —

In the last analysis the Court of Appeals relied on statistics to find Pullman discriminated against blacks in promotions to foreman, but refused to give statistical consideration to black refusals of such promotions:

> "The circumstances [i.e., black harassment of black supervisors, leading to absence of displaying good supervisory qualities and black refusals of promotions] *undeniably [sic]* emanate from the very discrimination

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[24]The current controversy in this area is illustrated by *EEOC* v. *Greyhound Lines*, ____ F.2d ____, 24 FEP Cases 7 (3d Cir., 1980); *Williams* v. *Boorstin*, ____ F.2d ____, 23 FEP Cases 669 (D.C. Cir. 1980); and *Marotta* v. *Usery*, ____ F.2d ____, 24 FEP Cases 17 (9th Cir., 1980).

> which the class members seek to eliminate. When *insufficient*[25] *initiatives* which purport *to rectify a personnel imbalance [sic]*[26] follow a history of preserving certain personnel positions for a select group based upon race, such peer pressure naturally and *conveniently* results therefrom. . . . We hold, therefore, that the defendants [sic] failed to rebut the plaintiffs' prima facie case of racial discrimination in the selection of supervisory personnel." [Emphasis added] (A. 176)

This passage asserts that if the employer doesn't meet his quota of black supervisors, it is no excuse that they won't be good supervisors or that they refuse the promotions. Apart from the problems of imposing quotas under Title VII, doing away with poor job performance and refusals as articulated explanations, and reconciling mandatory quotas despite such refusals with the XIII Amendment, this passage is a 180° reversal of the Fifth Circuit's holding in its 1976 decision in this case:

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[25]Compare *Teamsters* v. *United States*, 431 U.S. 324 at 339, n.20:

> " . . . §703(j) makes clear that Title VII imposes no requirement that a work force mirror the general population.
>
> ". . . It is clear beyond cavil that the obligation imposed by Title VII is to provide an equal opportunity for *each* applicant regardless of race, without regard to whether members of the applicant's race are already proportionately represented in the work force."

[26]Compare Civil Rights Act §703(j) and *Furnco Constr. Corp.* v. *Waters*, 438 U.S. 567, 577-79 (1978):

> "To prove that [he based his employment decision on a legitimate consideration,. and not an illegitimate one such as race, an employer] need not prove that he pursued the course which would both enable him to achieve his own business goal *and* allow him to consider the *most* employment applications. Title VII prohibits him from having as a goal a work force selected by any proscribed discriminatory practice, but it does not impose a duty to adopt a hiring procedure that maximizes hiring of minority employees."

> "The court found that 30 blacks and 17 whites have turned down hourly foremen opportunities since the mid-1960's. *This, of course, is a legitimate item of rebuttal to a prima facie case.* (Emphasis added.) (A. 81)

But what is perhaps a more serious problem with this reasoning is its patently ideological character: that black refusals *"undeniably* emanate" from discrimination and therefore furnish no legitimate explanation for not attaining statistical proportionality. Why can't this be denied? There was no *evidence* that black name-calling and other insolent treatment of black supervisors was causally related to employer mistreatment of blacks in any form.[27]

Even if it were true that this peer abuse was the result of employer discrimination, it would furnish no basis for requiring Pullman to fill foreman vacancies with the unqualified or less qualified,[28] nor of requiring involuntary servitude of blacks as supervisors.

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[27]It was only a vocal minority of blacks who engaged in this anti-progress peer pressure, which is hard to reconcile with the hypothesis that employer discrimination is what caused it. Furthermore, their leading spokesman, Louis Swint, gave an explanation in a radio broadcast for this antipathy toward black supervisors which is totally contrary to the Fifth Circuit's revealed wisdom. In it, Swint declared that anybody the white man puts in charge, "you can bet he's a Uncle Tom, because that man is not going to put anybody in there that's for the welfare of the working man . . . *It is not a question here of black versus white — it is a question of labor versus management.*"

[28]*Teamsters* v. *United States*, 431 U.S. 324, 358 (1977):

> ". . . the two most common legitimate reasons on which an employer might rely to reject a job applicant [are] an *absolute or relative lack of qualifications* or the absence of a vacancy in the job sought." [Emphasis added.]

It is noteworthy that the legitimacy of this reason is not conditioned upon whether or not the relative lack of qualifications is itself the result of some past discrimination.

The trouble with this substitution of ideology for fact is superbly expressed by the noted black economist, Thomas Sowell, in "Knowledge & Decisions" (Basic Books, 1980) 258-59:

> "The point is that both causal determination and policy prescription require coherent analysis, rather than gut feelings garnished with numbers. Many of the hypotheses behind 'affirmative action' are not unreasonable as hypotheses. What is unreasonable is turning hypotheses into axioms. The preference for intentional variables ('discrimination') has virtually excluded systemic variables (age, location, culture) from even being considered. . . . The general unattainability of many quotas means that [affirmative action] penalties fall equally on discriminatory employers and non-discriminatory employers . . . Moreover, the ease with which a discrimination case can be made makes minorities and women more dangerous employees to have. . . ."

We submit that certiorari should be granted to review and correct this process whereby ideology may supplant fact and law in the administration of Title VII.

IV.

The Court Below Erred In Holding Its "Business Necessity" Criterion Essential To Defending Against A Claim Of Discrimination Based On Promotion Statistics, To The Exclusion Of Absolute Or Relative Lack Of Qualifications, Observed Work Performance, Refusals Of Promotions, And Other Non-Discriminatory Considerations, Thereby Imposing Involuntary Promotion Quotas. —

Although Pullman clearly imposed no requirement that a foreman be promoted from within the same department, and 3% of such promotions were not from within the same department the Fifth Circuit apparently misunderstood that it did,

reaching this misconception from the District Court's explanation of its statistical methodology in connection with supervisory promotions. The Fifth Circuit then held that Pullman discriminated against blacks in promotions to foremen (it made *no* difference that more blacks than whites refused such promotions) because the imaginary requirement that supervisors be promoted from within the same department was not a "business necessity."

The phrase "business necessity" was coined by this Court in the *Griggs* case, 401 U.S. 424 at 431 (1971) in connection with intelligence tests which had a disparate impact; *Teamsters* 431 U.S. 324 at 335, n.15 says "business necessity" is part of the formula of proof in a testing or disparate impact case, but not in a disparate treatment case, that is, one not involving any test or screening device. Therefore, an employment decision based upon a direct evaluation of absolute or relative qualifications, without an intervening screening device, need not be justified by business necessity. *Griggs*, 401 U.S. at 431, 434; *Teamsters*, 431 U.S. at 358. Indeed, since a test to be valid must be "shown to be related to job performance", job performance itself automatically fulfills this requirement.

The effect of the Fifth Circuit's opinion is to require every deviation from statistical "balance" to be justified by "business necessity" which it defines in effect as proof of absolute indispensibility.[29] This has taken a phrase from *Griggs* out of con-

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[29]But see Chandler, "The Business Necessity Defense to Disparate-Impact Liability Under Title VII", 46 U.Chi.L.R. 911, 933 (1980): "The theoretical underpinnings of the ... defense, the legislative history of Title VII, and the Supreme Court's interpretations of that history all suggest that business necessity means nothing more than legitimate business purpose. The higher standard of business necessity adopted by the lower courts is fundamentally inconsistent with the equal-treatment rationale of the Act." Compare A. 175, where it is said that business necessity means an employer must show his actions were "essential to ... safety and efficiency."

text so as to apply it not only to tests and artificial screening criteria, but to promotion decisions based on relative job performance, and to non-attainment of statistical "balance". The practical result is to impose mandatory involuntary quotas.

For the above reasons, petitioner humbly prays that the writ of certiorari be granted.

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